

CHEVRON CHEMICAL CO.
F.S. INDUSTRIES, LTD.

IBLA 92-539

Decided October 25, 1994

Appeal from a decision of the Utah State Director, Bureau of Land Management, denying as untimely a protest of the approval of phosphate prospecting permit application U-26545.

Affirmed.

1. Mineral Leasing Act: Generally--Phosphate Leases and Permits:
Generally--Rules of Practice: Appeals: Timely Filing

A BLM decision denying as untimely a protest of the approval of a phosphate prospecting permit application without any no-surface occupancy stipulations will be affirmed where approval occurred by decision 3 years prior to the filing of the protest, the appellant had knowledge of the approval, and the appellant did not appeal the earlier approval.

APPEARANCES: Phillip Wm. Lear, Esq. and Thomas W. Clawson, Esq., Salt Lake City, Utah, for appellants; David K. Grayson, Esq., Office of the Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Chevron Chemical Company and F.S. Industries, Ltd. (collectively, Chevron) have appealed from a June 9, 1992, decision of the Utah State Director, Bureau of Land Management (BLM), dismissing their May 20, 1992, protest of the approval of phosphate prospecting permit application U-26545 without the inclusion of no-surface occupancy stipulations for certain of the permitted lands.

Elizabeth B. Archer filed phosphate prospecting permit application U-26545 on June 12, 1974, for 2010.81 acres of land located in Uintah County, Utah, near the town of Vernal. A portion of the acreage included in application U-26545 overlaps lands in which Chevron owns the fee surface by virtue of a land exchange with the United States. Specifically, these lands include Lots 1, 2, and 3 of sec. 1, T. 3 S., R. 21 E., Salt Lake Meridian. The United States conveyed to Chevron a fee simple estate in the surface of these lands pursuant to Patent No. 43-84-0017, issued on April 11, 1984, reserving a mineral interest in the United States (State-ment of Reasons (SOR), Exh. E). Chevron also asserts that Archer's application overlaps the following Chevron mill sites: TB-43-45, and TB-54-56

in sec. 35, T. 2 S., R. 21 E., Salt Lake Meridian, and TB-79-103, TC-1-20, TC-25-26, TC-31-32, and TC-38-39 in sec. 1, T. 3 S., R. 21 E., Salt Lake Meridian (SOR at 5; Exh. A). 1/ The subject lands are part of Chevron's phosphate mining and milling properties and facilities located near Vernal, Utah, referred to by Chevron as the "Vernal Phosphate Operations." 2/

In its protest Chevron contended that approval of Archer's prospecting permit application could interfere with development of its Vernal Phosphate Operations, particularly the expansion of a tailings pond which would inundate significant portions of Chevron's subject lands. 3/ Chevron requested that BLM impose no-surface occupancy stipulations on those portions of the permit application overlapping the subject lands.

BLM's June 9, 1992, decision denying Chevron's protest did so on the basis that Chevron's challenge to the approval of the application was untimely. The decision called attention to Environmental Assessment (EA), No. 1988-61, which was prepared by the BLM Vernal District Office, pursuant to requirements of the National Environmental Policy Act of 1969 (NEPA), 43 U.S.C. §§ 4321-4370 (1988), and to a March 31, 1989, Decision Record and Finding of No Significant Impact (DR\FONSI) based on that EA. The EA analyzed the effects of approval of three prospecting permit applications, including U-26545. The DR\FONSI, inter alia, approved Archer's permit application U-26545, as to 1,720.40 acres. BLM stated in its decision that as part of the EA process a public meeting was held in which Chevron representatives participated. The decision continued:

In addition, at least three offices of Chevron Resources, two offices of Chevron U.S.A., and Chevron Pipeline Company were on the mailing list to receive copies of a second draft of the EA mailed on October 7, 1988. These same offices were sent, by certified letter dated March 31, 1989, copies of the State Director's record of decision * * * in the case of the final EA 1988-61, allowing adverse parties the right of appeal * * *.

(Decision at 2).

The failure of Chevron's representatives to oppose BLM's DR\FONSI, was pivotal to the State Director's finding that Chevron's May 1992 protest was untimely. However, the State Director also stated, in response to Chevron's

1/ In its protest and in its SOR, Chevron referred to the fee lands and the land embraced by the mill sites collectively as the "Subject Lands" (Protest at 2; SOR at 5). We will use the term "subject lands" in this decision to describe those lands.

2/ Counsel for Chevron represents that Chevron Chemical Company sold its interest in the Vernal Phosphate Operations to F.S. Industries, Ltd., effective April 17, 1992.

3/ In its SOR, Chevron modifies that contention, alleging only that significant portions of its fee surface acreage in Lots 1 and 2, sec. 1, T. 3 S., R. 21 E., Salt Lake Meridian, would be inundated by the expanded tailings pond (SOR at 6, Exh. A at 3).

argument that issuance of the permit without the no-surface occupancy stipulations would create a substantial and unnecessary interference with Chevron's ongoing operations:

In a letter dated April 24, 1992, our Vernal District Office notified you that approval of the prospecting permit U-26545 would not impact any of Chevron's millsite claims. Their letter also stated that Archer was advised that private surface occurs within the prospecting permit application areas.

Prior to conducting any exploration-related activities on such lands, BLM would require Archer to take reasonable measures to reach an agreement with the surface owner (Chevron) to utilize the surface prior to exploration activity.

(Decision at 2).

Essentially, the State Director dismissed Chevron's protest as untimely because Chevron did not appeal the absence of no-surface occupancy stipulations in 1989, but he also indicated that no basis existed for imposing the requested stipulations.

Chevron poses four arguments in support of overturning the State Director's decision. Chevron first argues that the State Director erred by dismissing Chevron's protest as untimely, because a decision whether to impose no-surface occupancy stipulations on the subject lands is still within the State Director's discretion, and Chevron filed its protest before the State Director finalized his action. Second, Chevron contends that the decision whether or not to impose no-surface occupancy stipulations on the subject lands must be made on the record, and no such record exists. Next, Chevron alleges that their protest poses serious questions about conflicts arising from simultaneous mining and exploration operations which must be resolved. Finally, Chevron contends that the failure to consider potentially adverse economic effects that might result from the absence of no-surface occupancy stipulations violates the requirement that BLM action be in the public interest.

In its Answer, BLM argues that Chevron's appeal is "frivolous" and that it is untimely because it is a "belated attempt" to appeal the DR\FONSI (Answer at 1). BLM maintains that the DR\FONSI constituted approval of Archer's permit application for all purposes, including multiple-use purposes, and that Chevron had notice and opportunity to address those issues prior to issuance of the DR\FONSI and failed to do so.

In reply, Chevron contends that its appeal is not a "belated attempt" to challenge BLM's March 1989 decision to approve the permit subject to special stipulations. It claims that it does not object to approval of the permit application, but does appeal BLM's 1992 decision "determining the scope, form and substance of the special stipulations" (Reply at 2). Chevron also charges that no final decision on stipulations was made in 1989 because the scope, form, and substance of the special stipulations were not finalized at the time the DR\FONSI issued. Chevron points out

that BLM continued to add to and alter the special stipulations until the permit was offered to the permittees in 1992. Chevron further argues that BLM's decision refusing to impose a no-surface occupancy stipulation on the subject lands ignores the Board's holding in Elizabeth B. Archer, 102 IBLA 308, 316 (1988), requiring that a BLM decision on a phosphate prospecting permit application must be supported by facts of record.

[1] We disagree with BLM that Chevron's appeal is "frivolous;" however, we agree that the appeal is untimely. Chevron does not deny that it was aware of BLM's March 1989 DR\FONSI. Instead, Chevron states:

Had Chevron desired to challenge the Decision Record and FONSI, it would have done so in 1989. Rather, Chevron protests the lack of present consideration given to the conflicts which are certain to arise between simultaneous mining and exploration operations conducted by Chevron and Archer on the Subject Lands. These conflicts involve multiple-use issues, not NEPA compliance issues. [Emphasis in original].

(SOR at 10).

Chevron appears to believe that the only challenges that could have been made in 1989 to the DR\FONSI and the underlying EA were environmental challenges. While numerous parties did, in fact, appeal the DR\FONSI alleging violations of NEPA, the Board was not limited to consideration of appeals raising environmental issues. ^{4/} If, as Chevron alleges, it is adversely affected by BLM's 1992 denial of its protest objecting to approval of permit application U-26545 without no-surface occupancy stipulations, it was adversely affected by BLM's 1989 DR\FONSI approving permit application U-26545 without any no-surface occupancy stipulations. It should have raised its objections in an appeal of BLM's 1989 DR\FONSI.

[2] Chevron's attempt to segregate its multiple-use concerns and pose them as an objection that may be raised at any time must be rejected. The record does not support its assertion that its protest raised "significant matters which have not been previously addressed" (SOR at 10). A review of the record reveals that BLM was well aware of Chevron's interest in lands covered by the permit application. First, a stipulation included as one

of the stipulations imposed on the approval of Archer's application was: "The permittee must obtain access rights prior to any exploration or sur-face disturbing activity on privately owned surface lands" (Attachment 3 to

^{4/} BLM's DR\FONSI was appealed by Uintah Mountain Club, Dry Fork Coalition, Maeser Water Board, Taylor Mountain Grazing Association, Uintah Basin Archeology Club, Concerned Citizens for Management of Public Lands, and the Ashley Valley Water District. Those groups contended that significant impacts and environmental consequences identified in the EA required the preparation of an EIS. In Uintah Mountain Club, 116 IBLA 269 (1992), we rejected the appellants' arguments, finding that BLM's issuance of a FONSI was proper.

DR\FONSI at 1.h). 5/ Second, the EA states in the section discussing the anticipated impacts of exploration and lease development on minerals that there would be no anticipated impacts from exploration, but that "[t]he Chevron millsite claims would likely be considered invalid if a mineable phosphate deposit [were] found by the applicant" (EA at 31). BLM determined that no mitigating measures were necessary. Id.

Thus, it is clear that BLM considered the potential for conflicts with Chevron's interests during its EA review process and found no mitigating measures to be necessary. By not appealing that determination in 1989, Chevron foreclosed its opportunity to thereafter object to lack of no-surface occupancy stipulations. 6/ In a letter to counsel for Chevron, dated April 24, 1992, in response to Chevron's initial request that the Archer permit include no-surface occupancy stipulations, the Vernal District Manager explained in detail the factual rationale for not including no-surface occupancy stipulations in the permit:

The ownership status of T. 3 S., R. 21 E. (SLB&M), Sec. 1, Lots 1-3 was review[ed] as per title plats maintained by the Bureau. Our official status records show that Chevron U.S.A. did receive a patent to the surface of Lots 1 - 3 and the patent document indicates all minerals were reserved to the Government. This patent reservation includes provisions for the prospecting for and development of the minerals. The proposed action analyzed by EA 1988-61 includes a map which shows the only exploration planned by the Archers within Section 1 are third priority core holes located to the south and west of Lots 1 - 3.

To be valid, mill sites must be used or occupied for mining or milling purposes and shown by the locator to be nonmineral-in-character for locatable minerals. There are no records of pending or existing "notices" or "plans of operation" filed with the Vernal District Office, under the "Surface Management" regulations (43 CFR 3809), to use or occupy the mill sites in question within Section 1, nor any filings by the locator to show the subject sites are nonmineral-in-character. The mill sites within Section 35 of T. 2. S., R. 21 E., are within the Ashley National Forest. Garth Heaton of the Ashley National Forest Supervisor[']s Office indicated their office has no plans on file from Chevron to operate on any of the mill sites in Section 35 under Department of

5/ A second sentence was added to that stipulation and presented to Archer by notice dated Apr. 10, 1992, to-wit: "The AO [Authorized Officer] shall receive a copy of such access rights and will be informed if the surface owner agreement deviates from the requirement to fully reclaim drill holes, drill pads, and drill site access."

6/ In The Wilderness Society, 106 IBLA 46, 53 (1988), the Board held that where an appellant attempts to raise issues that were finally decided in an earlier decision, which decision was not appealed, the appeal is not timely as to those matters which could have been previously decided.

Agriculture regulations (36 CFR 228(A)). The only plans by Chevron, of which my staffs are aware, concern future tailings disposal operations to expand the current tailings retention dam so the tailings pond behind would rise to an elevation of 5,970 feet by the year 2005. This apparently would not impact any of the mill sites listed in your letter, but would inundate portions of Lots 1 and 2 of Section 1.

Therefore, it is not viable or warranted to apply the "No Surface Occupancy" statement to the prospecting permit application U-26545. The State Office of the BLM, which has the approval authority for prospecting permit applications, has already sent the Archers a list of stipulations and a request for a posting of a bond for application U-26545. The Archers were advised that private surface occurs within the prospecting permit application areas; and, to conduct any exploration related activities on such lands would require the Archers to take reasonable measures to reach an agreement with the surface owner to utilize the surface prior to exploration activity.

Moreover, section 3(f) of Archer's permit states: "The permittee shall observe such conditions as to the use and occupancy of the surface of the lands as provided by law, in case any of said lands shall have been or may be entered or patented with a reservation of mineral deposits to the United States."

The case cited by Chevron, Elizabeth Archer, supra at 316, requires that where BLM exercises discretionary authority, "the justification therefor * * * [must appear] of record." In this case, BLM exercised its discretionary authority in approving permit application U-26545 without any no-surface occupancy stipulations. The justification for that action appears in the record before us.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

John H. Kelly
Administrative Judge